United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2592

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 74-2592

- - - - - - - - - X - - - - - - - - -

PETER BARTOK,

Plaintiff-Appellant,

- v -

BOOSEY and HAWKES, INC., and
BENJAMIN SUCHOFF, as Trustee
of the Estate of Bela Bartok,

Defendants-Appellees.

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

Issue

The sole issue for review is whether the District Court (Owen, J.) in its Opinion filed September 27, 1974 (92a)* erroneously concluded that Bela Bartok's musical composition "Concerto for Orchestra" (hereinafter the "Concerto") is a "posthumous work" for purposes of Section 24 of the Copyright Act, 17 U.S.C. §24.

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* Numbers in parentheses are page references to Appellant's Appendix.

The effect of the District Court's interpretation of the term "posthumous" is to enable defendant-appellee Boosey & Hawkes, Inc. ("Boosey & Hawkes"), the publishing company to which the composer assigned the original twenty-eight year term of copyright in the Concerto, to capture the twenty-eight year renewal term of copyright as well, in derogation of the express purpose of the legislature to grant the renewal term of copyright, under the circumstances of this case, to the composer's widow and children.

Statement of the Case

A detailed statement of the relevant facts is specifically set forth in the affidavit of Peter Bartok sworn to April 29, 1974 (4a), and the Court is respectfully referred thereto.

In essence: (1) Bela Bartok completed composition of his "Concerto for Orchestra" on October 8, 1943; (2) Thereafter, in November and December of 1943, respectively, the composer assigned his copyright in the composition and delivered the manuscript to the music publisher, Boosey & Hawkes, who was contractually obliged to issue a printed "edition" promptly; (3) In 1944 and 1945, Bela Bartok witnessed the widespread public dissemination of the work through public concert

performances and radio broadcasts, and its enthusiastic reception by large audiences and numerous music critics; and (4) As a result of the prior assignment of copyright to Boosey & Hawkes, the Concerto did not pass to the composer's Estate upon his death in 1946. It is appellant's contention that, under these circumstances, the composition does not fall into the category of "posthumous works" for purposes of Section 24 of the Copyright Act.

It is the position of the publisher, Boosey & Hawkes, that inasmuch as the printing of the score with copyright notice was not completed until some time after the composer's death, the composition became a "posthumous work."

The District Court, in the first judicial opinion ever to confront this issue*, accepted Boosey & Hawkes' interpretation and awarded to the publisher the right to secure the renewal term of copyright in its own name as the "proprietor of a posthumous work," pursuant to the provisions of Section 24 of the Copyright Act.

Appellant contends that the District Court's

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* The only prior judicial comment on the term "posthumous" was offered in passing in the dictum of Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697 (2d Cir. 1941). As discussed infra, the Shapiro, Bernstein comment, although relevant, is not precedent for the issue before this Court. Nimmer on Copyright, Sec. 114.1 at 464 (1973); Ringer, Renewal of Copyright, Copyright Office Study No. 31, p. 125 n. 155(1), contained in Fisher, Studies on Copyright, Vol. 1.

unprecedented decision has the following effects:

1. By adapting a colloquial, dictionary definition of "posthumous," restricts the legal definition of the term to its narrowest meaning, for no justifiable purpose, thereby inordinately enlarging the class of "posthumous works" for purposes of Section 24, and renders the fundamental rights governed by that classification contingent upon unrelated outside events;

2. Fails to protect the rights of an author's widow and children to the renewed copyright term and its attendant benefits, in accordance with the rights of succession intended by Congress, against a publisher who, as owner of the original term of copyright, could become "proprietor of a posthumous work" by failing to complete production of a printed edition during the author's lifetime, and thereby capture for itself the renewal term of copyright as well (as will be accomplished in the present case if the District Court's definition is upheld);

3. Enables a publisher, by failing to effect the one form of dissemination within its control, i.e. the issuance of a printed "edition" of a work, to arbitrarily transform what is in every respect a non-posthumous work into a "posthumous work," and thereby, to its own benefit, render defeasible at will the rights and protections afforded by Congress to an author and his family;

4. Encourages the suppression of printed product -- a policy detrimental to the public interest and violative of the spirit

of the Copyright Act, which contemplates the widest dissemination of creative works; and

5. Enables a publisher to thwart the efforts and intentions of a composer, who took every measure within his control to bring his work to the public as early as possible and to have it considered a lifetime accomplishment.*

The Relevant Statute

Section 24 of the Copyright Act,** 17 U.S.C. §24, provides:

> The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That in the case

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* There is no dispute that Boosey & Hawkes obtained assignments of the renewal copyrights from the author's widow and children and from the trustees under Bela Bartok's will, and also signed agreements with the same parties providing for the payment of royalties. These facts are not dispositive of the issue before this Court. If the work is deemed "posthumous," Boosey & Hawkes is entitled to the renewal copyright term and royalties generated by the work during that term will be payable to the trustee under the will; if the work is deemed not to be "posthumous," the assignment by the widow and children is valid and Boosey & Hawkes continues to be publisher of the work, but the royalties generated will be payable in equal shares to the widow and children. Moreover, regardless of any prior assignment of rights, a renewal application must be made in the name of the party entitled to the renewal copyright under the provisions of the statute, Ringer, Renewal of Copyright, Copyright Office Study No. 31, p. 167, citing Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943), and Rose v. Bourne, Inc., 176 F.Supp. 605 (S.D.N.Y.1959), aff'd 279 F.2d 79 (2d Cir.), cert. denied 364 U.S. 880 (1960), which fact cannot be determined without a resolution of the issue herein.

** Section 24 is the successor provision to Section 23 of the Copyright Act of 1909.

> of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work including a contribution by an individual author to a periodical, or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. July 30, 1947, c. 391, 61 Stat. 652.

Accordingly, pursuant to the express provisions of Section 24, in the case of a "posthumous" work, the "proprietor," i.e. owner of the copyright at the time of renewal registration, is entitled to secure the renewal copyright in its own name and

on its own behalf. Ringer, Renewal of Copyright, Copyright Office Study No. 31, p. 128. If the work is not "posthumous," the right to renewal vests in accordance with the following statutory schedule:

1. To the author, if living;

2. To the widow and children of the author, if the author be not living;

3. To the author's executor, if there be no surviving widow or child; or

4. To the author's next of kin, in the absence of a will, in that order of priority.

Errors Committed by the District Court

1. The Court was in error by interpreting appellant's position as if performance of the work during the author's lifetime was the sole basis of the claim that the work is not "posthumous", whereas appellant's claim is based on a far broader complex of circumstances;

2. The Court, in framing its definition of a "posthumous work," entirely overlooked the rationale of Congress in excluding "posthumous works" from statutory

succession to copyright renewal rights, and disregarded the legislature's intent to reserve the right to copyright renewal to the statutory successors of deceased authors who disposed of the original copyright term during their lifetime;

3. The Court misinterpreted the relevance of the Shapiro, Bernstein decision, supra, as well as the dictum itself;

4. The Court relied on the text of an application form printed by the Register of Copyrights, and on Congress's failure to include a definition of the term "posthumous work" in its pending revision of the Copyright Act, even though neither of these facts bears any relevance to a determination of this case; and

5. The Court erroneously cited as support for its definition a work by Frederick Chopin designated by its publisher as a "posthumous work," even though the circumstances surrounding the publication of that work are not analagous to those surrounding the publication of Bartok's "Concerto for Orchestra."

ARGUMENT

"CONCERTO FOR ORCHESTRA" IS NOT A POSTHUMOUS WORK FOR PURPOSES OF SECTION 24 OF THE COPYRIGHT ACT

A definition of which works of an author should be classified as "posthumous" must take into paramount consideration the purpose of the legislature in enacting the statutory provision. It is, therefore, necessary to examine that purpose and the underlying rationale of excluding "posthumous works" from the succession to copyright renewal otherwise specified in the statute.

(a) The Intention of the Congress

On March 27, 1908, at the Congressional Committee Hearings before the Joint Committee on Patents, the following colloquy took place between the Chairman and William Allen Jenner of New York on the subject of whether to extend the author's term of copyright for an additional fourteen (14) years:

> The Chairman: I would like to ask you a question. Would not the publisher, if a third term were given, make a contract with the author stipulating that not only was he to have control of the publication for the first twenty-eight years, but that he should control it, and the right to publish it, under the original contract, for the fourteen-year extension period and if we give another extension of fourteen years, then for the second fourteen-year period?

Mr. Jenner: It is never done, and I have some doubt about whether it legally could be done. But I should be glad to see that so provided for that it could not be done under the law.

Representative Law: Then put it in the bill itself.

Mr. Jenner: Put it in the bill itself, and say that it cannot be done, so that the author is certain to have that extension as a provision for his age or a provision for his widow and his children. [Applause.]

It is uniformly accepted by the courts and commentators that the purpose of the renewal period was to award a second term of copyright to authors (and their families) who because of financial hardship found it necessary to sell their creative works for a pittance, generally resulting in substantial profits to the publishers and little financial reward for themselves.

The Committee Report on the 1908 Act stated as follows:

> Your Committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right. Rothenberg, Copyright Law, "Committee Report on the 1909 Act", C.1, Sec. 9 at 60 (Clark Boardman Co. 1956).

This purpose has been recognized by the courts:

> There are at least sentimental reasons for believing that Congress may have intended that the author, who according to tradition, receives but little for his work, and afterwards sees large profits made out of it by publishers, should later in life be brought into his kingdom. White-Smith Music Publ. Co. v. Goff, 187 Fed. 247, 251 (1st Cir. 1911);
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> * * *
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> The second period is intended not as an incident of the first for the benefit of the then owner of the expiring copyright, but as a second recognition extended by the law to the author of the work that has proven permanently meritorious. Harris v. Coca Cola Co., 73 F.2d 370, 371 (5th Cir. 1934).

It has also been suggested that giving the author a "second chance" to profit from his creative product reflects Congress' understanding that "author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position." Ringer, Renewal of Copyright, Copyright Office Study No. 31, p. 125.

In further analyzing the aims and intents of the renewal provision, Ms. Ringer states that:

> (2) If the author were dead, Congress wanted to insure that his 'dependent relatives' would receive the benefits of the renewal, regardless of any agreements the author had entered into.

Although for the majority of cases, i.e. where the author has died before the end of the first copyright term, Congress granted the renewal right to the specified successor classes (e.g. widow and children), there are the stated exceptions in Section 24 where the proprietor of the first term is entitled to renew the copyright. "Posthumous works" are such an exception.

There is a logical basis for each exception*, although, as Nimmer observes:

> The preference of proprietor over author, or necessarily in this instance, his widow and children, (or executor or next of kin), seems least justified in the case of posthumous works. Nimmer on Copyright, Section 114.1 at 464 (1973).

Nevertheless, in the usual case of "posthumous works" (where the manuscript was dormant and no copyright was disposed of during the author's life), the author's legal successors have the right to dispose of the copyright. Under the statute, they must include the renewal copyright term in such disposition inasmuch as the publisher-assignee or "proprietor" of the first term will be entitled to renew the copyright after twenty-eight years. The commentator Theodora Kupferman suggests an explanation:

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* Kupferman, Renewal of Copyright, 44 Columbia Law Review, p. 712.

> The justification in such a case is that the distributees of the authors have received the whole right in the work to dispose of and there would be no necessity for applying the schedule (of statutory succession). Kupferman, Renewal of Copyright, supra.

In the case of the usual non-posthumous work (where the author assigned his copyright to a publisher and publication was completed during the author's life), the author is unable to have disposition over the renewal copyright term unless he survives to the time when renewal vests. This is so even if he attempted to commit his renewal expectancy at the time of making the assignment of the first copyright term. As discussed by Professor Nimmer:

> If the author (or other assignor of the renewal expectancy) is not living when the renewal right vests, then those persons who by statute succeed to the renewal rights are not bound by any assignment executed by the author (or by any assigning member of a prior renewal class), so that the assignee takes nothing. (Miller Mfg. Co. v. Chas. N. Daniels Inc., 362 U.S. 373 (1960); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946)). . . It means that in the usual case where an assigning author does not survive to renewal vesting, his widow and children acquire renewal rights unencumbered by any prior assignment. Nimmer on Copyright, Matthew Bender, 1974, vol. 2, sec. 117.3, p. 503.

Therefore, beyond dispute, the proprietor of the original copyright term of the usual non-posthumous work (a publisher who derived his proprietorship through an assignment by the

author) does not have a claim to the copyright renewal if the author does not survive to the end of the first term, even if the author had attempted to grant it to the publisher.

In the present case, the appellee publisher seeks an interpretation of the "posthumous works" classification as including works the first term copyright of which the publisher obtained from the author during his life. Such an interpretation would mean that a publisher could obtain the right to publish an author's "posthumous works" directly from the author, and thereby, if the author dies subsequent to the assignment and prior to the printing of the work, obtain the right to the renewal copyright term as well. The effect would be equivalent to an assignment of the renewal expectancy by an author to a publisher, valid without the necessity of the author's survival to the end of the first copyright term. The statutory successors would be excluded. At the same time, the author's legatees would also have no disposition over the first and renewal copyright terms, even though such disposition is regarded as the only justification for the inclusion of "posthumous works" among proprietor renewals in Section 24.

This effect would be in conflict with the legislature's intent, whereby the statutory successor class may not be cut

off from the right of copyright renewal by an assignment of the renewal expectancy by an author, unless the author survives to the time when the renewal would vest. The effect would also be in conflict with the only justification for the inclusion of "posthumous works" among proprietor renewals as in the case of the indisputably posthumous work, where an author makes no disposition over the first copyright term, such disposition being left to his legatees.

In view of these conflicts, it follows that, in including "posthumous works" among proprietor renewals in Section 24, Congress did not intend to include works the first term copyrights of which the author himself disposed of. It can be concluded, therefore, that for the purposes of Section 24, the term "posthumous works" does not include works whose publication right was derived from, or arranged by, a living author through a copyright assignment. Only such an interpretation is in harmony with the Congressional intent.

The foregoing conclusion is supported by the commentary of Theodore Kupferman, who states that:

> . . . it cannot be seriously contended that the word 'posthumous" was designed to include the situation of a sale by a living author of his common law copyright. If such were the case, there would be no justification for permitting the proprietor to obtain the renewal. Kupferman, Renewal of Copyright, supra at 715.

In addition, Ringer, in a discussion critical of the language of Section 24, remarks that under an interpretation of the term "posthumous works," such as that rendered by the District Court below:

> . . . an assignment by the author of the rights in his unpublished works would cut off his family's renewal rights in any such works that are not published before he dies. This result was undoubtedly not intended. . . . Ringer, Renewal of Copyright, supra at 128-129.

The District Court herein commented that were the framing of a definition of "posthumous" solely a question of legislative intent, appellant would have prevailed (98a). Appellant maintains that it is. Accordingly, Bela Bartok's "Concerto for Orchestra", the copyright of which was assigned by the living composer to the appellee Boosey & Hawkes (which assignment the composer's widow and sons were not parties to), cannot be regarded as a "posthumous work" for purposes of Section 24 of the Copyright Act.

(b) Appellant's Definition of "Posthumous" Work

Appellant contends that inasmuch as the term "posthumous" for purposes of Section 24 of the Copyright Act has never been defined, the Court is not bound to define a "posthumous work" in terms of when a particular work is

"published." Indeed, there are many dictionary definitions of the term which make no reference to "publishing" or "publication."

H.W. Fowler's "A Dictionary of Modern English Usage" (2d ed. 1965) analyzes the origin of the word "posthumous" as follows:

> Posthumous, the 'h' is silent and also, though never omitted, etymologically incorrect. Postumus, last, superlative of latin post, was applied in English usage especially to the last born of a family, and so to one born after his father's death. The 'h' was inserted because the word was wrongly supposed to be derived from post humum, i.e. after the father had been laid in earth, and so it eventually became confined to that meaning.

Both the Hungarian and German words for "posthumous," "hátrahagyott" and "nachgelassen" or "hinterlassen," respectively, as applied to artistic works, translate literally as "left behind," and apparently refer to the process of leaving property to successors. The Hungarian dictionary "A Magyar Myelv Ertelmzeo Szotara" (1960) explains "posthumous" as "someone or something who, or what, remained alive or was left to his heirs after one's death." The Hungarian-English dictionary (Volland-Kundt, 1924) explains "posthumous" as something "left" or "bequeathed." "Webster's New World Dictionary and Thesaurus of the American Language" (1970)

further defines "posthumous" as "arising or continuing after one's death." These definitions seem to refer to works found at the deceased author's bedside or his rooms after his death and, clearly, do not embrace Bela Bartok's "Concerto for Orchestra."

Moreover, although certain statutory provisions of the Copyright Act specifically refer to the concept of "publication," e.g. Section 10, Section 24 does not. Accordingly, neither logic nor the statutory provision, by its terms or legislative history, compels the application of a "publishing" concept to the designs of Section 24.

Further, as recognized by the courts, the concept of "publication" has different meanings within the Copyright Act itself depending upon the purposes sought to be accomplished by the various provisions. In the case of American Visuals Corp. v. Holland, 239 F.2d 740, 743 (2d Cir. 1956, the Second Circuit noted:

> [C]ourts will require considerably more open dissemination before holding that publication has taken place so as to deprive the creator of the material of his rights in it, than where a copyright certificate has been obtained and the plaintiff is claiming sufficient publication to enable him to maintain an action on the federal statute. Id.

Indeed, in the latter instance, where the purpose is to grant

owners of copyrights easy access to the courts, it has been held that the mere exhibition of a painting* or the mere deposit of two copies of the work with the Library of Congress** constitutes sufficient "publication" to enable plaintiff to maintain a suit under the Copyright Act.

Even if this Court were constrained to apply a "publishing" concept to the term "posthumous" as it applies to Section 24, it is established in law that a creative work need not be mechanically "printed" or distributed in "tangible copies" to the general public to be "published." Black's Law Dictionary (4th ed. 1951) at p. 1397, in distinguishing "publishing" from "printing," states, id.:

> To "publish" a newspaper ordinarily means to compose, print, issue and distribute it to the public, and especially its subscribers, at and from a certain place. To "print" may therefore refer only to the mechanical work of production, in re Monrovia Evening Post, 199 Cal. 263, 248 p. 1017, 1019, and constitute a narrower term than "publish." In re Publishing Docket in Local Newspaper, 266 Mo. 48, 187 S.W. 1174, 1175.

The essence of "publishing" according to Black is the process of making a work generally known to the public. Although Black's definition specifically refers to a newspaper, which, by its nature, must be printed before it can be disseminated

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* Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 Fed. 54 (1st Cir. 1896).

** Cardinal Film Corp. v. Beck, 248 Fed368.(S.D.N.Y. 1918).

to the public, such is not the case with visual art which is generally disseminated by exhibition, or with music, which is generally disseminated by performances in concert, radio broadcasts and recordings.*

Although the District Court below regarded the colloquial dictionary definition of a "posthumous work" i.e. one published after the death of its author, as having "acquired a specific meaning" in the field of music**, it is a cardinal principle of statutory construction that strict, literary dictionary definitions, which are inconsistent with the intent of the Act, must be abandoned in favor of interpretations which advance the fundamental legislative purpose. C.I.R. v. Brown, 380 U.S. 563, 671 (1965); Knapp v. McFarland, 462 F.2d 935, 939 (2d Cir. 1972); Salt River Project Agr. & Power Dist. v. F.P.C., 391 F2d. 470, 474 (D.C. Cir.), cert. denied 393 U.S. 857 (1968). Section 24 of the Copyright Act represented an attempt to correct the inequitable situation whereby publishers, through economic

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* Clearly, this Court must be cognizant of the fact that the definition which it frames must be applicable to the many art forms which the copyright law protects.

** Appellant maintains that the term "posthumous" has not acquired any meaning for purposes of Section 24 of the Copyright Act.

leverage, were traditionally able to capture the entire term of copyright. It granted to the author or his family rights in a renewal copyright term, regardless of whether the author, by virtue of necessity or otherwise, sold, assigned, or otherwise transferred it to a publisher. The District Court's dictionary definition for "posthumous work" makes it possible for a publisher who has acquired from the author the original copyright term to defeat the author's renewal rights and capture for himself two successive copyright terms by simply failing to distribute or make available to the general public printed copies of the work in the author's life. Any definition which so unravels the fabric of the statute must be summarily rejected.

Accordingly, appellant submits that for purposes of Section 24, a work is not "posthumous" which: (a) has been sold, assigned, transferred or otherwise disposed of by an author during his lifetime and which therefore did not become property of the author's estate upon his death; and (b) has been generally made known to the public during the author's lifetime through the media appropriate to its particular art form. Bela Bartok's "Concerto for Orchestra" satisfies both criteria.

(c) The Definition of "Posthumous" in the Copyright Laws of Other Countries

Performance of a musical work in its author's life, although not the sole basis for appellant's contention, is nevertheless a fundamental consideration if the copyright laws of other countries are examined which, unlike the United States statute, do define "posthumous works." Many countries, in framing their copyright laws, have rejected the vague, dictionary definition of the term in favor of a more accurate concept, thereby effectively limiting, rather than enlarging, the class of "posthumous works."

Section 2(3) of the British Copyright Law of 1956 applies the classification of "posthumous" only to those works which have not undergone any of the following events prior to their author's death:

a. publication of the work;

b. performance of the work in public;

c. the offer for sale to the public of records of the work; and

d. broadcasting of the work.*

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* Copinger & Skone James on Copyright, §272 at 114 (10th ed. 1965); H.L. Pinner, World Copyright, An Encyclopedia, p. 583 (1957); Whale, Copyright: Evolution, Theory and Practice, p. 43 Tongman Group Ltd., London, 1971).

The concept that either publication or public performance or the public sale of records will serve to prevent a work from being deemed "posthumous" similarly appears in Canadian law.*

The issue of whether a musical composition which is publicly performed, broadcast over the radio, or sold on phonograph records, but not available in printed form during an author's lifetime can be defined as a "posthumous work," for the purpose of Section 24 of the Copyright Act, remains an open question. Nimmer suggests:

> It further remains to be seen whether courts will hold that a work is posthumous if it is publicly disseminated during the author's lifetime but not published in the technical sense until after the author's death. In view of the questionable rationale for this provision and the possible legislative oversight in including [posthumous works] among proprietor renewals, it would seem that a construction is justified which includes among posthumous works only those which have received no public dissemination in any form during the author's life. Nimmer on Copyright, §114.1 at 464 (1973).

Plaintiff urges that British law, which guided the framers of the United States Copyright Law, should similarly serve to guide this Court in reaching its determination. As proposed in Ladas, The International Production of Literary and Artistic Property, Harvard Studies in International Law, p. 330

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* Canadian Copyright Act, R.S. C32 Sec. 6 (1952).

(Macmillan Co. 1938):

> The conception of posthumous works differs in various countries. In some, a work is posthumous if it has not been "published" by issue of copies thereof during the author's life. In others, a work is not deemed posthumous if it has been well known to the public by any means whatsoever, as, for instance, by presentation (in the case of a dramatic work) or execution (if a musical work) . . . Inasmuch as what the law protects is the creation of the author, and the work comes into existence from its creation, not merely its publication by "edition," it would seem that any means by which knowledge of the work by the public was obtained during the author's life should be deemed to withdraw the work from the class of posthumous works.

(d) Shapiro, Bernstein & Co. v. Bryan

In his discussion of Section 24 of the Copyright Act, particularly the proprietor exceptions to the statutory succession to copyright renewal, Judge L. Hand mentioned:

> The first class [of exceptions] provides for "posthumous works," i.e. those on which the original copyright has been taken out by someone to whom the literary property passed before publication.*

The dictum has been critized for its ambiguous wording, as it is not clear what was meant by the "passing" of the

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* Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697 (2d Cir. 1941). The case otherwise concerned another one of the exceptions to statutory succession, and therefore is not precedent for the issue before this Court.

literary property, i.e. copyright, to someone before publication.* Literally, the reference could apply either to the assignment of the copyright to a publisher (who then publishes with copyright notice in his own name), or to the "passing" of the copyright and manuscript of a work (not completed or set aside by the author in his life), as a consequence of the author's death, to his estate or heir, who subsequently publishes the work with copyright notice in his own name (or assigns the copyright to a publisher for purposes of publication). Since under the former interpretation any sale by an author of a common law copyright would render the related work "posthumous," even if the author was living at the time of publication, such interpretation cannot be seriously considered.** Nimmer adds: "Such a construction would not only do violence to the essential pattern of renewal rights, but would render the term "posthumous meaningless."***

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* Nimmer on Copyright, §114.1 at 464 (1973); Kupferman, Renewal of Copyright - Section 23 of the Copyright Act of 1909, 44 Colum. L. Rev. 712, 715 (1944).

** Nimmer on Copyright, §114.1 at 464 (1973).

*** Id.

Further, inasmuch as voluntary assignments to a publisher or other third parties may take place with many works which are not "posthumous," and need not necessarily take place with many works which are unquestionably "posthumous," the term "passed" as used in the Shapiro, Bernstein comment must necessarily refer to involuntary transfers to heirs (or an Estate) at the time of the author's death, which is the only form of transfer common to all "posthumous" works.

Since the copyright of Bela Bartok's "Concerto for Orchestra" did not "pass" to his Estate, as it had been assigned by Bela Bartok to Boosey & Hawkes, and since the arrangement for issuance of a printed "edition" of the work was not made by the executors of Bela Bartok's will, but by Bela Bartok hinself, as set forth in his contract with the publisher (15a) and set in motion by his delivery of the completed manuscript to Boosey & Hawkes at the end of 1943 (28a), the conclusion that this work is not "posthumous" comports with the dictum of Judge Hand.

(e) Miscellaneous Errors by the District Court

The District Court attributed significance to the printed copyright renewal application form issued by the Register of Copyrights, which, in its general instructions, offers an explanation of the traditional form of posthumous work, i.e. ". . . [a] work first published and copyrighted after the death of an author." (100a) The Copyright Office, however, is not empowered by statute to issue regulations or opinions which define the substantive provisions of the Act, or conduct administrative proceedings to resolve conflicting claims of copyright. The Office's limited function is described in its own Circular 1B, which provides:

> The Copyright Office is primarily an office of record: a place where claims to copyright are registered when the claimant has complied with the requirements of the copyright laws. However, the regulations of the Copyright Office (Code of Federal Regulations, Title 37, Ch. II) prohibits us from giving legal advice or opinions.

The suggestion that this definition is of probative value in determining the meaning of the term "posthumous work" as it applies to Section 24 should be summarily rejected.

The District Court likewise attributes significance to Congress's continued use of the word "posthumous" without change in recent bills relating to the revision of the

Copyright Act (100a). Inasmuch as the meaning of "posthumous work" was never expressed by the legislature, nor is there any judicial precedent on the point, Congress's failure to amend the provision so as to include a definition of the term cannot be said to constitute tacit approval of some unspecified definition.

The District Court attempts to derive conclusive support for its view of Bela Bartok's "Concerto for Orchestra" as a "posthumous work" by erroneously analogizing the Concerto to Frederick Chopin's "Rondo in C major for Two Pianos, Opus 73" (hereinafter the "Rondo"). The District Court's opinion relates that the Rondo was published as a "posthumous" work six years after Chopin's death even though it had been previously performed by the composer approximately twenty-five years earlier (101a). From these facts the Court concluded that the term "posthumous" has been internationally defined for at least 120 years.*

The District Court drew the parallel by noting that both the Chopin work and the Bartok work had been performed in their respective authors' lifetimes, failing to observe the critical differences between the circumstances relating

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* Chopin died in 1849.

to publication of the cited Chopin work and of the Bartok Concerto. The Chopin Rondo was composed 21 years prior to Chopin's death and was played by him soon afterwards. The manuscript was thereafter laid aside by Chopin for reasons not known. It was not given to any publisher. No arrangement for publication of the work was made by Chopin in his life, and the manuscript and associated copyright of the Rondo remained Chopin's property until the day of his death. The manuscript was later found among those of numerous other unpublished works by a friend named Julian Fontana, who arranged the publication of these works in cooperation with Chopin's family in 1855, six years after the composer's death.*

Thus, except for its early performance by the composer, the Chopin work falls into the category of the usual "posthumous work," and the circumstances of its publication differ fundamentally from those of Bela Bartok's "Concerto for Orchestra." Chopin shelved his manuscript soon after completing the composition and playing it, and someone else had to find it among the composer's possessions after his death. Bela Bartok delivered the manuscript of

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* Murdoch, Chopin: His Life, pp. 42-44 (Macmillan Co. 1935).

his "Concerto for Orchestra" as soon as he completed it, with a copyright assignment, to his publisher, for the purpose of having it printed as soon as possible. At the time of Chopin's death, the copyright of the Rondo passed to his Estate, his family, whose cooperation was required for publication (i.e. the publisher needed the family's consent, agreement, or assignment of copyright). The copyright of Bela Bartok's "Concerto for Orchestra" did not pass to his Estate. His executors or trustees never gained disposition over the work and could neither publish it nor prevent publication as a result of Bela Bartok's prior assignment to Boosey & Hawkes. Whereas the Chopin manuscript was lying dormant at the time of Chopin's death and needed to be "unearthed" by someone years afterwards before publication could commence, Bela Bartok's "Concerto for Orchestra" score had been widely disseminated and was virtually on the printing press when its composer died.

Moreover, the Chopin work conforms to Judge Hand's definition of "posthumous work" as expressed in Shapiro, Bernstein & Co. v. Bryan, supra, in that the work "passed" to another, i.e. Chopin's Estate, as a consequence of the composer's death. Bela Bartok's "Concerto for Orchestra" does not.

Just as "intent" determines legal rights and obligations of parties to a contract, the disposition of Estate property, the guilt of an accused in a criminal proceeding, the existence of certain forms of tortious conduct, and other legal questions, "intent" is often the decisive factor in determining rights under the copyright law, e.g. whether an author has abandoned his literary property* or effected a general publication of his work**, or whether the contributions of several authors constitute a joint work***. There is no sound reason in policy or law why the intent of an author should not similarly be accorded substantial consideration in determining whether a work is "posthumous." In the instant case, Bela Bartok's conduct indisputably evidenced every intention that his Concerto be promptly published, printed, and as widely disseminated to the general public as possible during his lifetime. Conversely, Chopin took apparently no steps toward

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* National Comics Publications, Inc. v. Fawcett Publications, Inc., 90 U.S.P.Q. 274, 277 (2d Cir. 1951); Chamberlain v. Feldman, 300 N.Y. 135, 139 (1940); but see King v. Mister Maestro, Inc., 140 U.S.P.Q. 366, 368 (2d Cir. 1963).

** American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299-300 (1907).

*** Nimmer, The Law of Copyright, §70 at 276 (1973).

printing and publishing his Rondo, so that no one other than himself was likely to have played it in his lifetime.

Accordingly, it is abundantly clear that the facts surrounding the two compositions are not analogous.

Further, it may be noted that even the conclusion which the District Court draws from the Chopin case (i.e. that for at least 120 years musical works, if performed in their authors' lifetimes but published in printed form only after their death, are internationally classified as "posthumous") is unwarranted. Although the publisher labelled the Chopin publications as "posthumous," the Rondo at least (the only work in the group known to have been played in public during the composer's lifetime) would not be classifiable as a "posthumous work" under the copyright laws of Britain or Canada (see pp. 23-24, supra). Contrary to the District Court's opinion, the publisher's "posthumous" designation of this work is not internationally accepted.

Parenthetically, we need not go far in searching for an example of a musical work performed in public in its author's lifetime and yet not designated as a "posthumous work" by its publisher. The score of Bartok's "Concerto for Orchestra," the subject work of this case, was not designated as a "posthumous work" by its publisher, the appellee herein,

unlike the score of Bela Bartok's last composition, the "Viola Concerto" which bears that label, and is also designated as a "posthumous work" on the copyright registration form (46a).

Finally, the District Court misconstrued appellant's position. Appellant's position is summarized in Peter Bartok's affidavit, sworn to April 29, 1974 (8a):

> 17. It is respectfully submitted that the Concerto, a work which: received wide public dissemination through several media on numerous occasions well within my father's lifetime and with his cooperation; had been scheduled to appear in print more than a year before my father's death; had been assigned by my father to a publisher, and accordingly, was not among the literary properties which passed to my father's estate; and which was far from the last work of Bela Bartok, having been followed by at least three other major compositions, cannot by any reasonable standard be viewed as a "posthumous" work. Furthermore, the mere fact that a publisher fails to issue a formal printed "edition," for whatever reason, prior to an author's death, is by itself an insufficient ground for changing classification of the work to "posthumous," the effect of which would be to deprive the author's surviving widow and children of the rights guaranteed them under Section 24 of the Copyright Act.

The District Court interpreted appellant's position as follows. (99a):

> . . . Peter Bartok takes the position, not illogically, that regardless of the dictionary definition of "posthumous" discussed infra, it

> cannot possibly apply to a musical work that was publicly performed a number of times by the Boston Symphony Orchestra in the composer's lifetime with the composer present, as well as being broadcast during his lifetime.

Obviously, the District Court overlooked the following facts essential to a determination of the issue herein:

1. Copyright in the work was assigned by the author to the publisher nearly two years before the author's death. Consequently, the work did not pass to the author's Estate to be disposed of by his executors.

2. The manuscript was delivered by its author, nearly two years prior to his death, to a publisher who was contractually obliged to publish a printed edition at a time which would have fallen well within the composer's lifetime. Moreover, work on publication of the score began well within Bela Bartok's lifetime and proceeded with his cooperation. Had the preparation of the printed score been concluded within the time specified by Bela Bartok's contract with the publisher, it would never have occurred to anybody to regard this composition as a "posthumous work."*

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* The District Court's remark in its Opinion (93a, footnote) that"there is no evidence that Bartok sought to enforce" the contractual requirement to produce the printed edition within six months after receipt of the manuscript by the publisher, is not relevant inasmuch as this case does not concern a breach of contract, nor is it suggested that the publisher committed any such breach. The relevance of

CONCLUSION

Classification of a literary or musical work into the categories of "posthumous" or "not posthumous" determines who will benefit from the work in the renewed copyright term. The dictionary definition of "posthumous works" adopted by the District Court makes that classification and its attendant rights and benefits wholly dependent upon one single event -- the date a publisher chooses to print an "edition" of the work with copyright notice. Such definition entirely overlooks

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the six-month schedule specified in the contract is merely to show that, had it been possible to meet that schedule, the printed score would have been ready long before the composer's death. Furthermore, the devastation of World War II was well known (noted also by the District Court (94a)) while preparation of the printed score was in progress. Even if the contract had not protected the publisher against delays encountered by circumstances beyond its control (15a), it would have been unreasonable of Bela Bartok to demand strict compliance with the specified production schedule on the part of a publisher working amidst London's ruins. The mere dispatching of mail across the Atlantic (needed for submission and return of proofs) took as long as three months (81a), and there were "very few printers left who [could] do this work . . . owing to the drainage of labor into the armed forces and armament work." (79a)

Apparently assuming that Bela Bartok both acquiesced to delays and introduced some, too, the District Court also remarked on Bela Bartok's supposed rewriting of some of the music after the first performance (94a). Actually, however, Bela Bartok wrote a new alternate ending to the work some time before March 15, 1945 (84a), which constituted added material rather than modification of what had already been written. (See printed score of "Concerto for Orchestra," last three pages.)

the disposition, if any, of the work and its copyright by the author, the public exposure which the work received and the status of the production of the printed edition, all during the composer's lifetime. The District Court's definition substitutes in place of these relevant factors a superficial act within the control of a party who stands to gain by choosing to forestall the printing date until after the author's death. Publishers, thus, by merely failing to print a work during an author's lifetime, could arbitrarily convert a lifetime accomplishment into a "posthumous work," thereby capturing the renewal copyright term for themselves. This would be contrary to the legislature's intent to protect the author's successors from precisely such conduct, by reserving the right to copyright renewal to the statutory successors, e.g. the author's widow and children.

Congress, in excepting "posthumous works" from the line of succession specified in the statute, did not intend to include in that exception works which the author had disposed of during his life, but only those works which passed to the author's Estate as a result of his death. Congress could not have intended to make the rights of an author's family dependent upon an arbitrary act of a publisher or upon

a wartime bomb temporarily putting a London printing press out of commission.

It is respectfully submitted that, for the purposes of Section 24 of the Copyright Act, a work is "posthumous" only if the rights to copyright and exploit it were not exercised or granted by the author to another during his lifetime, but rather, passed under his will or by intestacy to his Estate or heirs. In the alternative, a work is "posthumous" if it has not been generally made known to the public during the author's lifetime through the media appropriate to the particular art form in question. Clearly, Bela Bartok's "Concerto for Orchestra" cannot be regarded as a "posthumous work" under either definition.

For the foregoing reasons, the judgment of the District Court should be reversed, and Bela Bartok's "Concerto for Orchestra" declared not to be a "posthumous work" for the purposes of Section 24 of the Copyright Act.

Dated: New York, New York
March 17, 1975.

Respectfully submitted,

ORENSTEIN ARROW SILVERMAN & PARCHER, P.C.
Attorneys for Plaintiff-Appellant
1370 Avenue of the Americas
New York, New York 10019

By: Peter A. Herbert

PETER A. HERBERT,
A Member of the Firm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

PETER BARTOK,

Plaintiff-Appellant,

-against-

BOOSEY and HAWKES, INC., and BENJAMIN SUCHOFF, as Trustee of the Estate of Bela Bartok,

Defendants.-Appellees

AFFIDAVIT OF PERSONAL SERVICE

74-2592

- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

TED J. SIEGEL, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 105 Haven Avenue, New York, New York 10032. That on the 18th day of March, 1975, deponent served the within Appellant's Appendix and Brief for the Appellant upon Wolf Popper Ross Wolf and Jones, at 845 Third Avenue, New York, New York 10022, and Fishbein & Okun, at 609 Fifth Avenue, New York, New York 10017, attorneys for defendants-appellees Benjamin Suchoff and Boosey & Hawkes, Inc., respectively, by delivering true copies thereof to them personally.

Ted J. Siegel

TED J. SIEGEL

Sworn to before me this
18th day of March, 1975

Deborah Nocerini

Notary Public

DEBORAH NOCERINI
Notary Public, State of New York
No. 30-4511761
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1975

INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

CORPORATE VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

CERTIFICATION BY ATTORNEY

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19

.....

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

.....

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true-certified-copy of a

duly entered in the office of the clerk of the within named court

on 19

Dated: 19

Yours, etc.,

ORENSTEIN, ARROW, SILVERMAN & PARCHER

Attorneys for

Office and Post Office Address

1370 Avenue of Americas

Borough of Manhattan New York, N. Y. 10019

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

ORENSTEIN, ARROW, SILVERMAN & PARCHER

Attorneys for

Office and Post Office Address

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Borough of Manhattan New York, N. Y. 10019

To: Esq .

Attorney for

Index No. 74-2592 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETER BARTOK,

Plaintiff-Appellant

-v-

BOOSEY and HAWKES, INC., and BENJAMIN SUCHOFF, as Trustee of the Estate of Bela Bartok,

Defendants-Appellees.

AFFIDAVIT OF PERSONAL SERVICE

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JUdson 6-1451

To: Esq .

Attorney for

Service of a copy of the within

is hereby admitted:

Dated, N. Y., 19

Attorney for

BLACKSTONE STATIONERS, INC. 585 MERRICK RD. LYNBROOK, N. Y.